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In the Supreme Court of the United States

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

ROY I. CABALLES,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF *AMICI CURIAE* The Illinois Association of Chiefs of Police and The Major Cities Chiefs Association IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The Illinois Association of Chiefs of Police ("IACP") is a voluntary professional organization comprised of over 800 members from jurisdictions across Illinois. Those jurisdictions include law enforcement executives from large urban centers employing thousands of police officers, to small, rural municipalities with only a few officers. Most IACP members are active members of law enforcement, many of whom maintain canine programs within their jurisdictions and utilize canine assets to enhance investigatory and enforcement activities within legal parameters. In addition, IACP members include legal advisors who counsel law enforcement officers and administrators on such issues, including the formulation of policy on the subject. IACP members are committed to the best interests of their respective communities and the law enforcement profession.

The Major Cities Chiefs Association ("MCC") is a professional organization of police executives representing the 59 largest cities or jurisdictions in the United States and Canada. Representation in the United States exceeds 200,000 law enforcement personnel serving a population in excess of 47 million. The MCC provides a forum for urban police chiefs, sheriffs, and other law enforcement chief executives to discuss common problems, share information and problem-solving strategies, and articulate the public safety needs of large cities in the formulation of criminal justice policy. The MCC is dedicated to the advancement of research, legislation, policy and programs that ensure the safety of our citizens and the officers that protect them.

Because of the direct relationship between IACP and MCC members and the daily activities of law enforcement across the United States, amici have firsthand

knowledge of the practical impact of the Illinois Supreme Court's ruling in this case, and are therefore in a unique position to impart their knowledge to this Court. The IACP and the MCC believe that their views will aid this Court in the resolution of the issues raised in the petition for writ of certiorari.[1] The consent of the parties has been obtained and written consents are being filed with the Court.

SUMMARY OF ARGUMENT

The Illinois Supreme Court's opinion undercuts a valuable tool in the war on drugs through a misunderstanding of the permissible scope of police activity during a traffic stop and a misapplication of *Terry v. Ohio*, 392 U.S.1 (1968). The decision further undercuts this Court's determinations that canine sniffs during traffic stops do not implicate the fourth amendment because they do not constitute searches requiring probable cause or articulable suspicion. *See City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), and *United States v. Place*, 462 U.S. 696 (1983). Moreover, the lower court's opinion contravenes *Whren v. United States*, 517 U.S. 806 (1996), which permits officers to utilize traffic violations as a means of investigating possible illegal drug activity.

In the instant case, the canine sniff was conducted during a vehicle stop which was supported by probable cause. The canine sniff did not extend the duration of

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the IACP or the MCC, their supporters, and their counsel, made a monetary contribution to the preparation and submission of this brief.

the stop. On the contrary, the canine sniff of the exterior of the vehicle was completed in less than a minute and prior to the completion of the warning citation for the initial stop. The use of the canine to conduct the sniff of the vehicle was simply an additional investigative process applied to a vehicle properly stopped for a traffic violation.

There is no sound basis for the view that police who have probable cause to make a traffic stop are precluded by the fourth amendment from utilizing the range of investigative aids at their disposal where those practices do not constitute a search or otherwise extend the period of detention. In addition to its impact on the war on drugs, such a construction of the fourth amendment threatens to undermine the government's war on terror, which relies on canines to sniff vehicles and luggage for narcotics and explosives at large gatherings or at transportation centers such as our nations' airports.

REASONS FOR GRANTING THE WRIT

I. THE ILLINOIS SUPREME COURT'S DECISION IMPERMISSIBLY GRAFTS A RIGHT TO BE FROM CRIMINAL INVESTIGATION ONTO THE FOURTH AMENDMENT

The Illinois Supreme Court's announcement of a fourth amendment right to be free from canine sniffs during vehicle stops without even acknowledging the existence of *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), and *United States v. Place*, 462 U.S. 696 (1983) is striking evidence of the opinion's unsoundness. Though this Court held in *Place* and *Edmond* that canine sniffs on luggage and vehicles do not constitute searches

triggering fourth amendment protections, the lower court erroneously relied on *Terry v. Ohio*, 392 U.S.1 (1968), which had nothing to do with either canine sniffs or the application of general investigative procedures, for the proposition that police must possess reasonable suspicion of criminal activity before they may conduct any kind of criminal investigation, including a canine sniff, during a traffic stop.

The Illinois Supreme Court's application of a reasonable suspicion standard to canine sniffs conducted during traffic stops impermissibly grafts an unprecedented right to be free from criminal investigation onto the Fourth Amendment. This significant limitation on law enforcement crime fighting tools is unjustified because the use of such dogs, under the circumstances of the instant case, did not constitute a search, did not prolong the stop, and did not, therefore, implicate the Fourth Amendment.

Police narcotics detection dogs serve law enforcement as a valuable tool in connection with the effort to stem the tide of illegal narcotics flowing into and within our nation through its airports, borders, interstate highways, and city streets. Alth' ugh complete statistics on the use and effectiveness of canines by law enforcement are not readily available, in the opinion of the amici, canine sniffs such as that used in the instant case are critical to effective law enforcement. In the experience of our members there have been countless occasions where dangerous contraband has been discovered though the use of canines. The Illinois Supreme Court decision would dramatically limit the ability of law enforcement to employ canines, unnecessarily impairing narcotics enforcement efforts.

While there is a lack of comprehensive data on use of canines at the local level in the recovery of narcotics, the

experiences of the federal government in using canines illustrates their value as investigative tools. For example, the federal customs service has been utilizing canines for over 30 years with remarkable success. As the United States Customs and Border Protection website indicates, the use of canines has resulted in over 130,000 drug and narcotics seizures. This represents the confiscation of narcotics with an estimated street value of several billions of dollars. *See* U.S. Department of Homeland Security, U.S. Customs and Border Protection, Canine Enforcement Program, Website http://www.cbp.gov/xp/cgov/enforcement/canines/canine_program/canine/xml (January 28, 2004). Moreover, our members have observed that with the increasing sophistication of criminals in concealing narcotics in traps installed in passenger vehicles the use of canines to detect drug contraband is growing even more important.

While canines are a highly effective investigative tool in alerting law enforcement to the presence of narcotics and dangerous contraband, they are employed with minimal intrusion on the privacy rights of individuals. When properly trained, the dogs' heightened sense of smell allows them to detect specified narcotics without entering or rummaging through the vehicle. As a result, none of the contents are disturbed or otherwise revealed. Unless the dog alerts on the vehicle, the government never obtains any information about the owner's property or the contents of the vehicle. In our experience canine sniffs of vehicles are accomplished in minutes or seconds. The inconvenience to the vehicle occupants is minimal.

Conceptually, walking a dog around a vehicle is precisely analogous to an officer walking around the car and making observations, with the key exception that

a canine's heightened sense of smell allows it to pick up the scent of narcotics inside a trunk where a human being could not. No one would seriously dispute that an officer who smells marijuana coming from a vehicle while talking to a driver during a traffic stop possesses probable cause to take further action. The walking of a canine around the car does not invade the driver's privacy any more than does a police officer walking around the car. The mere fact that a canine's observations are more effective than a human's because of its heightened sense of smell should have no consequences in terms of the application of the fourth amendment.

Given the *de minimus* nature of any privacy intrusion, the lower court's reliance on *Terry* for the proposition that reasonable suspicion must accompany canine sniffs was unsound. If, as this Court held in *Place* and *Edmond*, a canine sniff is not a search, then neither *Terry* nor any of the Court's other precedents supports the application of any standard of suspicion to the government's use of the canine. Indeed, *Terry*'s application of a reasonable suspicion standard to frisks for weapons acknowledged that a frisk is a search, though not as intrusive as other searches for which the Court has always required probable cause. Here, the use of a canine is not a search, and therefore, the fourth amendment is not implicated.

While *Terry* requires investigative detentions, which are seizures, and weapons frisks, which are searches, to be premised on reasonable suspicion, neither *Terry* nor any of the Court's subsequent cases support the notion that every police action which does not qualify as a search or seizure during a traffic stop must be independently examined for reasonableness. To the contrary,

Terry only contemplates that conduct which extends the length or alters the character of the stop (i.e., the use of handcuffs) be analyzed to determine whether the stop, at some point, ripened into an arrest requiring probable cause. In this case, however, there is no contention that walking the canine around the car in any way prolonged the stop or constituted an arrest. Thus, by subjecting this simple investigative tool to a reasonable suspicion standard, the Illinois Supreme Court has impermissibly grafted a general right not to be investigated onto the Fourth Amendment.

II. THE LOWER COURT'S OPINION IMPERMISSIBLY GUTS DRUG INTERDICTION PROGRAMS WITHOUT JUSTIFICATION AND IN CONTRAVENTION OF WHREN V. UNITED STATES

The Illinois Supreme Court's rejection of canine sniffs during traffic stops contravenes this Court's decision in *Whren v. United States*, 517 U.S. 806 (1996), which upheld the viability of pretextual traffic stops under the Fourth Amendment. The *Whren* Court explained that, so long as an officer possesses reasonable suspicion of a traffic violation, he may stop a vehicle even if his true purpose is to investigate whether the driver is involved in illegal drug activity. Of course, any such stops remain subject to constitutional scrutiny under the equal protection clauses if police exercise their discretion to stop vehicles on the basis of race or other class based animus. *Id.*; *See also United States v. Armstrong*, 517 U.S. 456 (1996).

In reliance on *Whren*, many police agencies, including the Illinois State Police (ISP), have implemented drug interdiction programs, which actively utilize traffic stops

as a means of developing reasonable suspicion of illegal drug activity, in order to combat the use of interstate highways for illegal narcotics trafficking. *See Chavez v. Illinois State Police*, 251 F.3d 612 (7th Cir. 2001) (rejecting racial profiling challenge to ISP's "Operation Valkyrie" drug interdiction program). These programs utilize a variety of tools in order to develop reasonable suspicion and probable cause of drug activity. The ISP's drug interdiction program trains officers to use both observation and conversation in an effort to determine whether a driver is transporting illegal narcotics. *Id.* at 621-22. An officer is trained to look for a host of potential indicators, including citizen band's radios, tinted windows, radar detectors, perfumes, duct tape, pagers, missing dashboard screws, missing handles and door knobs, and zippered bags.[2] While the presence of such indicators, either individually or in combination, may well be entirely innocent, they may also be indicators of illegal drug activity.

Officers are further trained to engage the occupants of the vehicle in consensual small talk, focusing on the purpose of the trip, points of origin and destination, and length of stay, as well as any explanations for the vehicle owner's absence, and information about where and when a vehicle was leased. Officers are advised to look for a subject's refusal or reluctance to answer,

[2] Other potential indicators are religious paraphernalia (sometimes utilized to divert suspicion), inability to roll windows all the way down (suggesting doors may contain contraband), high odometer mileage, especially in late model vehicles, switches and buttons (may activate electronic compartments), large sums of cash, attorney cards, drug paraphernalia, hiding places, weapons, one key rings, maps showing drug source cities, rented vehicles, cashier's checks, and bondo on the vehicle.

answering a question with his own question, unusual voice inflections or cracking, sighing, throat clearing, or yawning. Other potential indicators include the use of words and phrases such as "honestly", "truthfully", "I swear", etc. Officers are further trained to look for a host of signs and stress on subjects of vehicle stops, including blushing, turning pale, shaking, avoiding eye contact, repeated touching of the face, grooming, sweating, fidgeting, and nervous gestures. Again, such answers and idiosyncracies might well be innocent, or they might be indicative of a fear of being caught with illegal contraband.

A primary tool an officer possesses to distinguish between innocent reactions and criminally culpable behavior is the trained narcotics detection dog. While an officer is writing a ticket or issuing a warning for the traffic violation, he may ask that a drug detection dog be brought to the scene to walk around the vehicle to determine whether the smell of designated illegal contraband is escaping the vehicle. If the dog fails to alert during its brief walk around the car,[3] the driver is sent on his way without the officer ever having learned anything further about the contents of the vehicle. Only when the officer's suspicions are confirmed through an alert does the investigation continue.

The Illinois Supreme Court's application of *Terry*'s scope requirement to each and every aspect of an officer's conduct during a traffic stop effectively dismantles drug interdiction programs and dismisses *Whren* without justification. Though *Whren* unanimously upheld pretextual stops against fourth amendment challenge,

[3] In this case, the dog alerted to the drugs in the vehicle in less than one minute.

the Illinois Supreme Court has inconsistently concluded that the driver of a vehicle properly stopped for a traffic violation cannot then be investigated for possible drug activity. Under the lower court's approach, every question an officer asks during the stop must be independently analyzed for a determination of whether it was reasonably related to the underlying purpose of the stop.[4] Thus, most of the questions utilized by officers seeking to determine whether a driver might be transporting drugs would, under the lower court's view, violate the Fourth Amendment, and require the suppression of any evidence seized as a result of information developed from the driver's answers or reactions to those questions. Similarly, under the lower court's view, a police officer would violate the Fourth Amendment simply by asking a driver for consent to search the vehicle[5], since such a question will ordinarily be unrelated to the purposes of a stop for speeding or some other violation of a vehicle code.

In the instant case, the lower court dismissed the officer's observations of an air freshener and atlas, the

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[4] Indeed, the Illinois Supreme Court held, in *People v. Bunch*, 207 Ill.2d 7, 796 N.E.2d 1024 (2003), *petition for cert. filed* 72 USLW 3393 (November 19, 2003) that every question asked of a passenger during a traffic stop, including "what's your name" and "Where you (sic) coming from", is subject to fourth amendment scrutiny under *Terry*'s scope requirement. Subsequently, on the same day the instant case was decided, the Illinois Supreme Court held that a police officer violated *Terry*'s scope requirement simply by checking a passenger's identification card for outstanding warrants. *People v. Harris*, 207 Ill.2d 515, ___ N.E.2d ___ (2003).

[5] Drug Interdiction officers are also trained to request consent in connection with traffic stop based investigations of drug trafficking.

driver's nervousness, his choice of business attire for a cross country trip, and the absence of personal belongings in the car despite the driver's statement that he was moving to Chicago. The downplaying of these observations aptly illustrates the damage to drug interdiction programs attendant to the lower court's decision. Indeed, the lower court was correct that the observations identified by the officer could just as well be innocent as culpable, though they were confirmed in this case when the dog alerted to a large quantity of illegal narcotics. Nonetheless, the possibility that an officer might be misinterpreting wholly innocent behavior argues in favor of, rather than against, the use of canine sniffs as a means of confirming or dispelling suspicions without any significant intrusion on privacy interests.

Contrary to the implication in the lower court's analysis, the fourth amendment was never intended to level the playing field between law enforcement and criminals. It was not intended to give criminals a fair chance to avoid detection if they are careful to conceal their contraband. To the contrary, the fourth amendment was only intended to protect the government from invading individuals' reasonable expectations of privacy in their zeal to fight crime. Thus, if the government is able to develop effective tools such as highly trained canines for detecting criminal behavior without unreasonably detaining or searching its citizens, then the fourth amendment affords criminals no relief.

Canine sniffs enjoy great success because some criminals do not bank on the fact that contraband within their vehicles emits odors which can be detected by a dog simply walking around the car. On the other hand, many more knowledgeable potential drug traffickers

presumably choose not to transport drugs through our nations' highways and streets because of fear of detection by canines. The lower court's view that *Terry* prohibits canine sniffs, all investigative questioning, and computer checks on passenger identification, unless an articulable suspicion of criminality exists, sends a message to drug dealers that so long as they are careful to conceal their contraband and not affirmatively tip off the police, their drugs will be safe from detection, even when they are lawfully detained by law enforcement for traffic violations. It is anomalous to permit limit law enforcement to utilize pretextual stops for the purpose of investigating drug activity, as in *Whren*, and then rely on *Terry* to deprive them of the right to conduct any investigation once the vehicle is stopped.

Finally, any suggestion that sanctioning the use of canines during traffic stops will contribute to the creation of a police state in which citizens are routinely subjected to dog sniffs would be unavailing. As this Court recently noted in the context of informational checkpoints, such a concern is overblown given that police manpower and resources are limited. *Illinois v. Lidster*, ___ U.S. ___, 124 S.Ct. 885 (2004). In the present context, our members advise that those same limitations prevent law enforcement from training enough qualified handlers and dogs to allow a substantial proliferation of the use of canines. Indeed, we are advised that only a very small percentage of canine applicants are even accepted into the rigorous canine training programs.

Moreover, the use of canines during traffic stops can still violate the fourth amendment if they unnecessarily prolong the detention. That significant limitation makes it feasible for police to use a canine on a traffic stop only when a canine is already present in reasonable proximity to the scene of a particular stop. As a result, there is little reason to fear that dogs will soon be prowling our nations' highways sniffing every stopped vehicle.

III. NARROW LIMITS ON CANINE SNIFFS ADVERSELY IMPACT OTHER IMPORTANT LAW ENFORCEMENT INTERESTS

Amici believe that other weighty law enforcement interests are also threatened by the Illinois Supreme Court's limitation on the use of canine sniffs in the absence of articulable suspicion of criminality. Specifically, our members advise that in the arena of homeland security, canine sniffs for explosives are an important anti-terrorism tool established at the direction of the federal government. Canines have had a longstanding role in the area of transportation security. They are able to scan vehicles and luggage for explosives or narcotics in a fraction of the time and with far less intrusiveness than humans rummaging through belongings and utilizing other man-made scanning technologies. Moreover, the mere public presence of canines at transportation centers serves to enhance public confidence in the safety of the transportation system as well as deter against terrorist threat.

As threats from large improvised explosive devices placed in vehicles increase, the use of canines to conduct assessments of stopped vehicles will continue to grow. Our members indicate that canines are routinely used in parking facilities and roadways adjoining airport facilities to look for explosives.

The federal government clearly recognizes the important role canines can play in ensuring the safety of transportation centers like airports. The United States Department of Homeland Securities, Transportation Security Administration is currently funding local law enforcement to increase canine teams to be used at airports. In addition to use in terminals these canines are also used by local law enforcement during heightened security alerts to search parking areas and approaching vehicles on roadways. The continued viability of such important practices are threatened by the Illinois Supreme Court's interpretation of the fourth amendment.

In all respects the use of canines at transportation hubs are minimally intrusive while serving compelling public interests. They are of short duration and limited intrusiveness-designed only to detect explosives or narcotics. They do not expose any of a citizen's belongings to scrutiny or rummaging so long as the dog does not alert on contraband contained within. The dogs at transportation hubs are highly visible and thus serve an important deterrence effect. Though this Court's decision in *Place* would seem to sanction such programs, the lower court's decision in this case places them on uncertain footing in Illinois.

CONCLUSION

For the reasons discussed herein and in the Petition for Writ of Certiorari, amici respectfully request that this Honorable Court grant the petition, reverse the decision of the Illinois Supreme Court, and hold that on the basis of its precedent and sound judicial policy, the canine sniff in this case did not violate the Constitution.

Respectfully submitted,

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